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We need to talk about Charlie: putting the brakes on unlawful act manslaughter

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***Crim. L.R. 612** *Following a recent high-profile case in which a regulatory, strict liability offence was utilised to provide the "unlawful act" in unlawful act manslaughter, this article examines what is a sufficiently "unlawful" act to underpin that offence. It argues that the breadth of offences that can now be used to found an unlawful act manslaughter charge has led to a departure from the fair-labelling principle and traditional notions of culpability. Even the traditional argument, that the requirement of dangerousness sufficiently circumscribes those offences that qualify, has been weakened as that requirement has been diluted, and no longer provides adequate protection. Considering the legal position when a death resulted from a collision with a bike which did not comply with a Regulation, this article argues that trying to use unlawful act manslaughter to fill a lacuna in the law relating to fatal collisions involving cyclists risks unfairness to defendants through the unwarranted expansion of liability. New legislation is likely to be the most appropriate way properly to criminalise riding falling below the standard of a reasonable cyclist, but not amounting to gross negligence, that causes death.*

In February 2016, an 18-year-old was cycling along Old Street in London at lunchtime. He was obeying the speed limit and traffic lights. A 44-year-old pedestrian stepped out from behind a parked lorry. He shouted a warning of his presence. She froze. He swerved. She stepped into the path of his avoiding action. They collided, clashing heads. Both fell to the floor. A few days later, the pedestrian died of traumatic brain injuries from the collision. The cyclist was physically unhurt.

These are the bare facts of the incident that led to the trial of Charlie Alliston at the Old Bailey in August 2017. He faced a two-count indictment; unlawful act manslaughter, and wanton and furious driving contrary to s.35 of the Offences Against the Person Act 1861. To many observers, the facts set out in the first paragraph might raise the question of whether this was an accident in the purest ***Crim. L.R. 613** sense of the word. A pedestrian, possibly distracted, steps out into the road from behind an obstruction when there is a pedestrian-crossing metres away. A cyclist does his best to avoid her but is not successful, and collides with her. Is this not, some may wonder, the archetypal "accident", albeit with the most heart-wrenching consequences?

Legally, it might have been, were it not that Charlie Alliston's bike was a track bike, colloquially called a "fixie", and had no front brake (contrary to the Pedal Cycle (Construction and Use) Regulations 1983). The nickname "fixie" comes from the bike's fixed rear wheel. This provides the braking mechanism by, in simple terms, the rider providing resistance through the pedals to stop the wheels turning. This counts as a brake on the back wheel. To be lawfully ridden on a public road a bike must also have a front brake—this is provided for in the Pedal Cycle (Construction and Use) Regulations 1983 reg.7(1)(b)(i). The penalty for riding a bike without a front brake on the road under that legislation is a fine. That fine can be no greater than "level 3 on the standard scale": £1000.

Mr Alliston was initially charged with "wanton and furious driving" (see below). In December 2016, the Crown added a manslaughter count to the indictment. Specifically, unlawful act manslaughter. As described below in more detail, an allegation of unlawful act manslaughter requires that the defendant was performing an unlawful act, that is criminal per se, and dangerous. If this act caused the death of another then there is liability for unlawful act manslaughter. This is a form of constructive liability—where liability for a lesser offence creates liability for any death occurring as a result of that lesser offence. Such liability has never been without its critics amongst practitioners,[1] academics,[2] and the Law Commission.[3]

From this factual and legal background developed interesting legal points at trial. Through academic literature and case law I seek to argue that the range of offences which can amount to the "unlawful act" foundation of unlawful act manslaughter has become too wide, and that this case demonstrates that fact. No longer is the requirement of an act that is "criminal per se" being properly applied, leading to potential liability for death for those whose original action is far removed from the likelihood of causing death or serious injury. Whilst the "dangerousness" requirement has long been argued to be a sufficient check on this potential breadth of the offence, I argue that this is no longer so. The effect is to breach the correspondence and fair-labelling principles. As the legislature has shown a regrettable lack of action in the time since the Law Commission reported in 1996, I argue that it is for the courts to address this point clearly at appellate level when the opportunity arises. Furthermore, statutory provisions equivalent to those relating to motorised vehicles would provide legal certainty and more properly set out a scheme of liability for deaths caused by cyclists. ***Crim. L.R. 614***

Section 35—wanton and furious driving

Originally enacted to punish those driving horse-and-carriages irresponsibly, this offence has more recently been utilised to fill the lacuna in the law created by the lack of offences which specifically criminalise cyclists who cause death or serious injury. Where a vehicle that is not motorised is being driven in a fashion falling below that of a reasonable road-user, but not grossly negligently, and injury is caused, this offence is the obvious choice. It has therefore seen a resurgence with the increased use of bicycles in ever-more congested cities. Where death results from a collision, however, this still remains the obvious charge, preferable to the summary-only offences of dangerous and careless cycling (see below). Although triable only on indictment, this offence carries a maximum of two years' imprisonment.

This lacuna was brought into sharp relief in the *Alliston* case (see more below). In such circumstances, the provisions of ss.28 (dangerous cycling) and 29 (careless and inconsiderate cycling) of the Road Traffic Act 1988 are insufficient. Both are triable only summarily. The maximum penalty for an offence contrary to s.28 is a fine not exceeding level 4 on the standard scale – £2500, and for s.29, a fine not exceeding level 3 on the standard scale.[4] Offences such as causing death by dangerous driving[5] do not apply because a bicycle is not a vehicle capable of being "driven" within the meaning of the law as it is not motorised.

Section 35 reads as follows:

"Whosoever, having the charge of any carriage or vehicle, shall by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years."

It is clear that the "bodily harm" element, a necessary component of the offence, can be committed in a variety of ways: "wanton and furious driving", "racing", "wilful misconduct" or "wilful neglect". The ingredients of the offence have received relatively little judicial attention.[6] Quarter Sessions had held that the Crown must prove a degree of lack of care which would amount to dangerous driving: "wanton driving" indicates a positive lack of care and "wilful neglect" implies something of a negative nature.[7]

In *Alliston* the Crown pursued the "wilful misconduct" route—that by riding without a front brake, and knowing that he had no front brake, and intending to ride the bike on the road despite that, there was wilful misconduct by the defendant.

In *Cooke* [8] it was confirmed that there was no need for the prosecution to prove any intention by D to cause any injury or bodily harm: no mens rea as to consequences is needed. "Wilful" meant that D was driving and doing what he intended to do (i.e. driving voluntarily); "misconduct" had its normal meaning and the jury must decide what conduct on the part of a driver fell below the proper ***Crim. L.R. 615*** standard of driving so as to be called misconduct (and the substandard nature of the driving has to be intentional). The prosecution must show that that wilful misconduct by D was a substantial cause of the bodily harm.

The idea that "wilful" as articulated in *Cooke* means "doing what you intended to do" is somewhat perplexing, though it could be interpreted as meaning that intention is required as to circumstances but not consequences. In *Cooke*, D was driving a van, without lights, down an unlit footpath when he struck V, who was intoxicated. It is hard to imagine how D could have been driving the van "without

intending to". Indeed, it is hard to imagine how any act of driving any vehicle, bicycle or carriage could be done unintentionally. To interpret the word in this context as simply meaning "non-accidental" is to make a semantic nonsense; it must require that the misconduct element was intentional. However, the interpretation in the case law of "wilful" has not been consistently applied across all offences for which it is a required element.

As noted in a leading practitioner text on road traffic offences,[9] several difficulties of defining ancient offences in modern terms exist. In *Okosi*,[10] the trial judge directed the jury that the term "wanton" could apply to someone driving a vehicle irresponsibly or recklessly. Having defined recklessness, he described objective recklessness. The appellant argued that the jury should have been directed on subjective recklessness. In dismissing his appeal, the Court of Appeal held that assuming, but not deciding, that the correct approach to s.35 required recklessness, namely foresight of harm, but of a subjective and not an objective character, the direction given by the judge had amply warned them of the need to be sure that the defendant had been fully alive to the risk to which he was subjecting the deceased.

The s.35 offence also requires causation between the limb relied on (here, "wilful misconduct") and the bodily harm caused. In the *Alliston* case, this point should have been addressed by an expert. Evidence adduced by the Crown from two police officers who had conducted informal experiments on stopping distances was not challenged, yet a more scientific method would have produced greater clarity on the stopping distances of a bicycle with front and back brakes, as compared to a bicycle with only a fixed rear wheel. This was an important point on causation, akin to that in *Dalloway* [11]; it is not sufficient that without D's mere presence on the road the death would not have occurred. There must be a causal link between the manner of D's being on the road (e.g. not holding the reins on his horse and cart) and the death. If D had been driving properly and would still not have been able to avoid the occurrence that led to the death, then he was to be acquitted.

Unlawful act manslaughter—criminal and dangerous

(a) Criminal

Over the years, the requirement that the unlawful act must be a crime has led to this type of manslaughter gradually (and I would argue, welcomely) narrowing. In the late 19th Century, it was established that the act causing death had to be ***Crim. L.R. 616** criminal—being unlawful under civil law (i.e. a tort) was not sufficient,[12] and this has been accepted by the Court of Appeal more recently.[13] Furthermore, an act is required—an omission will not suffice.[14]

Prime examples of offences which have been utilised in the past as the unlawful act are affray[15]; burglary[16]; and attempted robbery.[17] Such offences as bases for the charge are uncontentious (assuming that one is comfortable with constructive liability for manslaughter at all). These are all offences which require clear mens rea elements and are unarguably "criminal": there is no lawful way in which one can participate in an affray, burgle or rob.

The suitability of other types of offences to underpin the unlawful act manslaughter charge is a point that has not been addressed clearly by the appellate courts. Lord Atkin's speech in *Andrews* [18] indicated that there would not necessarily be a manslaughter verdict where poor driving led to death unless it could be proved that there was a lower level of competence even than that required for a guilty verdict on a charge of death by dangerous driving.[19] His Lordship's argument was that driving was legal. Driving badly (even negligently) was the poor performance of a lawful act, not a fundamentally unlawful act.[20]

Although the conviction was upheld, some academics have argued that this particular passage is "judicial policy masquerading as a conceptually-driven distinction",[21] citing situations such as driving whilst over the legal limit for alcohol—fundamentally criminal, or a lawful act performed badly?—and emphasised that the need for such a distinction itself supports the abolition of such liability.[22]

In his seminal article, *"By Any Unlawful Act"*,[23] Buxton (later Buxton LJ) argued that if an offence had a constructive element, fairness to the accused required that the intended consequence of the underlying offence did not differ too greatly from death, which is the actus reus of the crime charged. He drew the parallel with liability for murder flowing from an intention to cause grievous bodily harm, which he viewed, with respect rightly, as unobjectionable. Tracing through cases from the 1800s, Buxton argues that a sensible distinction was apparent in earlier decisions. This was to separate unlawful acts and negligence, with the requirement that the former be directed consciously at the

victim, and not merely being hazardous to him.[24] In *Alliston*, this was precisely the distinction that was missing. However, despite a concentration on the connection between the unlawful element ***Crim. L.R. 617*** of D's conduct and the victim's death having as a logical conclusion the requirement of an assault directly against the deceased as the requisite "unlawful act", the courts made no such requirement explicit.[25] Some 52 years after Buxton was writing, we have moved so far away from this it is frightening. Not only does the unlawful act not need to be aimed at the deceased, it need not be calculated to cause harm.[26] Writing more recently, Simester has argued that strict liability is not inherently objectionable, unless it convicts the blameless of stigmatic crimes.[27] However, he also argues that conviction of stigmatic offences with a strict liability element, such as causing death by dangerous driving, is not objectionable providing D is culpable in relation to the death as well as the dangerous driving,[28] because the possibility of death is not random or unrelated to the wrong done in driving dangerously. The risk of causing death is part of the reason why dangerous driving is criminalised.[29] The link between no front brakes and the risk of death is more remote.

In practice, *Andrews* has been proffered as authority for the proposition that an unlawful act needs to be a crime of more than negligence or strict liability[30]; arguably an extrapolation from the distinction that Lord Atkins drew, though consistent with the fundamental underpinning in other cases such as *Lamb*,[31] in which Sachs LJ stated explicitly that "mens rea [is] now an essential ingredient in manslaughter".[32]

An opportunity to clarify this was sadly missed in a case of the same name (hereafter referred to as "*Andrews (Christopher)*" to distinguish it),[33] in which unlawful act manslaughter was under-pinned by a strict liability offence contrary to s.58 of the Medicines Act 1968. Section 67 of that Act makes a breach of s.58(2) an offence. This offence requires no mental element:

> (a) "no person shall sell by retail, or supply in circumstances corresponding to retail sale a medicinal product of a description or falling within a class specified in an order under this section except in accordance with prescription given by appropriate practitioner; and
>
> (b) no person shall administer (otherwise than to himself) any such medicinal product unless he is an appropriate practitioner, or a person acting in accordance with the directions of an appropriate practitioner. ***Crim. L.R. 618*** "

In *Andrews (Christopher)* , the appellant had pleaded guilty to the manslaughter offence after the trial judge had ruled that the consent of the person whom he had injected did not make his act in doing so lawful. It was whether this consent made the injecting of insulin lawful that was the question before the Court of Appeal. This meant there was no ruling as to whether the strict liability nature of the s.58 offence was any bar to its use as the "unlawful act" in unlawful act manslaughter, as the court was not seized of that issue. The question has therefore never been directly answered by the courts.

As Ormerod wrote,[34] *Andrews (Christopher)* was concerned at appellate level with whether or not the defence of consent was available to the unlawful act. It is uncontroversial that where there is a defence to the underlying unlawful act relied upon, that expunges the underlying crime and there is thus no underlying unlawful act upon which the manslaughter can be based. This meant that all argument in *Andrews (Christopher)* proceeded around the circumstances when, and if, consent would be a valid defence to the specific offence of administration of insulin—an offence contrary to the Medicines Act 1968. Ormerod notes that the matter of the underlying offence's attribute of being strict liability was not discussed at all.

In his commentary on the case, Reed highlights that the origin of unlawful act manslaughter—the murder/felony rule, relied on the felony to provide the mens rea for the manslaughter.[35] He maintains the traditional position that "only an act which is unlawful in itself (argued to be more than regulatory) may form the basis for unlawful act manslaughter", and observes that where a death occurs through negligence, the appropriate charge is one of gross negligence manslaughter. It is argued that this must still be right. This means that there will only be criminal liability for gross negligence, and not negligence; that is exactly as it should be. Liability based on negligence belongs to the civil world of tortious liability, for which deprivation of liberty is not a punishment.

More recently, in *Meeking*,[36] during an argument, the defendant pulled on the car handbrake whilst her husband was driving at around 60mph. The Court of Appeal upheld the conviction for unlawful act manslaughter, based on an offence contrary to s.22A(1)(b) Road Traffic Act 1988; an offence that

required a negligent act, done deliberately.

One possible interpretation of the ratio in *Meeking* is that the Court of Appeal were less concerned with the route to the manslaughter conviction because the facts clearly disclosed gross negligence manslaughter.[37] Pulling on a handbrake whilst travelling at 60mph falls so far below reasonable behaviour that it is grossly negligent. The conviction was upheld without clear logic on the unlawful act manslaughter point. Academic commentators have suggested this is because the Court was satisfied that even if this was not an unlawful act manslaughter, it would have been a gross negligence manslaughter,[38] despite there being no arguments or submissions on gross negligence manslaughter at the original trial. ***Crim. L.R. 619** [39]

Analysing the decision in *Meeking*,[40] Dyson began with the orthodox position (emphasis added):

"What is the lowest level of fault in conduct causing death which can lead to a conviction for manslaughter? What should it be? As a matter of principle and authority, the base offence in constructive manslaughter, which is objectively dangerous and causes death, *must require more than negligence or strict liability unless a statute expressly says otherwise*."

His key criticism of unlawful act manslaughter is that there is no requirement for fault *in respect of the death*, only in respect of the underlying offence. Fault in respect of the death is found in most homicide offences, and even in other forms of involuntary manslaughter, such as gross negligence manslaughter (albeit that that has an objective standard in respect of the fault). Thus, where the unlawful act offence itself does not have a fault requirement for every element of the actus reus (such as a strict liability offence) it could be argued that liability is attaching to what is, on a legalistic reading, a "no fault" situation. In common parlance, an accident.[41] Dyson argues from the standpoint, however, of scepticism of the acceptability of constructive manslaughter at all.[42] He concedes that an alternative option would be to permit the use of a strict liability offence as the base offence for constructive manslaughter, only where it was committed with fault. This would require a situation where a reasonable person would say there was a risk of death. This, however would be a significant shift from the principles of dangerousness as developed in the *Church* line of cases. Pointing to *Andrews* as clear authority against strict liability offences being sufficient for unlawful act manslaughter, and there being no clear authority in support, Dyson concludes that the law should be read restrictively. It is argued that this must be correct—where there is doubt regarding the ambit of an offence, it is trite to say that it is to be interpreted in the way that will benefit the defendant. However, when considering the outcomes of *Andrews* and *Meeking*, it must be noted that although Dyson points to them as authorities against negligence and strict liability offences underpinning unlawful act manslaughter, that point was not taken; not subject to legal argument, and not ruled upon, in either case. They are therefore, it is submitted, not authority for the propositions for which they are being advanced, though in that respect they were regrettably missed opportunities. Further support for this comes from the fact that unlawful act manslaughter was established as analogous to the felony/murder rule. There were a limited number of felonies—far fewer than the vast array of offences that can now underpin unlawful act manslaughter—meaning that the felony/murder rule was far more restrictive.

The formulation of the offence of unlawful act manslaughter has not been without critics within law reform circles, either. The Law Commission have considered the offence on three occasions: in a 1994 Consultation Paper and reports in 1997 (Law Com. No.237) and 2006 (Law Com. No.304). In these they had recommended reform which would have required subjective foresight of the risk of causing some injury, but these recommendations had never been brought into ***Crim. L.R. 620** legislation, as no action has been taken by the legislature. In more recent cases, the Court of Appeal has continued to acknowledge concerns in this area. For example, in *F(J) & E(N)* [43] the Court agreed with Professor Andrew Ashworth's comment on *M*,[44] that manslaughter of this type should be revisited by the Law Commission, it being more appropriate for there to be wide consultation on the issues and possible reform than piecemeal resolution by the courts. This echoed Buxton's plea in 1966 for the Law Commissioners or the House of Lords (in their then-role as the highest appellate court) "to develop *Andrews* and the nineteenth-century cases to produce a rule which links the accused"s legal guilt much more closely with his moral fault".[45]

Judge's ruling

In *Alliston*, the learned Judge was required to rule on submissions of no case to answer at the close of the Crown's case, based on the submission that the Crown did not have an unlawful act on which they could found an unlawful act manslaughter charge as the act on which they sought to rely was

neither criminal nor dangerous. Not accepting the submission, the Judge stated,

"*DPP v Newbury* [46] approved both *Larkin* and *Church* and disapproved the alternative line of authority that a subjectively guilty mind was necessary as suggested in *Gray v Barr*. Lord Salmon said 'an accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and dangerous and that act inadvertently caused death. It is unnecessary to prove the accused knew the act was unlawful and dangerous.' This was underlined by the fact that in *Andrews* [47] the unlawful act was one of strict liability."

With respect to her Ladyship, this is to misunderstand *Andrews (Christopher)*. D's state of knowledge as to dangerousness is unrelated to the permissibility of founding unlawful act manslaughter on an offence of strict liability. As I have noted above, the adequacy or otherwise of the conviction being based on a strict liability offence was never explored in *Andrews (Christopher)*. The case was determined solely on the basis of consent to that act. We have no way of knowing whether the Court of Appeal would have upheld the conviction if it had been challenged on the basis of the underlying strict liability offences being insufficient to found the manslaughter offence.

Her Ladyship also cited *F(J) and E(N)*,[48] stating,

"the Court of Appeal reviewed (inter alia) many of the authorities above, and accepted that they represented the law, declining to revisit the question of whether there should be a subjective test rather than an objective one when considering dangerousness, saying 'it is for Parliament to determine whether the long-established law needs changing …'". ***Crim. L.R. 621***

Once again, with respect, this argument is concerned with the "dangerousness" requirement of the offence, and whether the dangerousness needs to be perceived by the individual defendants, or by a reasonable person, as explored above. Furthermore, her Ladyship acknowledges herself at the beginning of her ruling that

"the guiding principles of this area derive from judge-made law and it is to precedent that I must look, informed by any other material that throws light on how these precedents should be interpreted."

It is submitted that on the law as set out above, there is no precedent that says that a strict liability offence is sufficient. The slate was clean, I would argue, on this point. An offence of negligence in *Andrews [1937]* was not enough. By extrapolation, neither should an offence of strict liability be so.

(b) Dangerous

Whether the unlawful act is dangerous is to be measured according to the judgment of the reasonable person. It is therefore objective, not subjective, following *Church*,[49] applying *Newbury*.[50] The decision in *Church* was a cause of concern for Buxton, as the term "dangerousness" does not specify who must be endangered, and its objective standard had the consequence of undoing the narrowing that courts had gradually imposed on unlawful act manslaughter.[51] Furthermore, the application of the objective standard is unwavering, even where that arguably compounds unfairness by holding youngsters to an unachievable standard.[52] In the recent case of *S* [53] the Court of Appeal held that the objective test in gross negligence manslaughter, denoted "a reasonable and prudent person of the applicant's age and experience".[54] Leigh asks why should the Court of Appeal make this exception yet refuse to acknowledge the capacity of the defendants in *F(J) & E(N)* ?[55] The distinction is arguably the difference between unlawful act manslaughter, where a criminal offence causative of death is required, as compared to gross negligence manslaughter, where there is an act attracting only tortious liability causing the death.

Furthermore, the harm objectively foreseen need not be death or even serious injury. If minor physical harm is foreseen by the reasonable person then the "dangerous" element is made out. Although recognised psychiatric injury would be sufficient,[56] sheer fright, however bad, is not sufficient.[57] The only exception to this is if it known to the defendant that the victim falls within a category of people who are likely to suffer physical harm as a result of a fright. This occurred in *Watson*,[58] in which *Dawson* was distinguished, as the defendant knew that his ***Crim. L.R. 622*** victim was an elderly man—by common sense, someone more likely to suffer serious physical harm, such as a heart attack, through extreme fright.

The specific type of harm need also not be foreseen, as reiterated in the case of *M*,[59] after some commentators expressed doubt about that aspect of the offence following *Carey*. In *M* the Crown appealed a terminatory ruling on a case of unlawful act manslaughter based on an affray. The Court

of Appeal allowed the appeal and the matter went to trial.[60] Thus it is apparent that it remains the case that:

"The question whether the reasonable sober person would inevitably recognise the risk of harm going beyond concern and fear and distress to physical harm in the form of shock would have to be resolved as a question of fact rather than law." [61]

This is entirely consistent with a careful reading of the decisions in *Carey* , *Watson* and *Dawson*. It was only in *Watson* that the appellant had had the level of knowledge about the deceased from his appearance that would have enabled him to foresee physical harm. In *Alliston* it would have required that the jury find that a reasonable person would have recognised the risk of physical harm to others from riding a bike with no front brakes.

(c) Causation

The matter of causation was relevant to whether riding a bike complying with the Regulations would have meant that Charlie Alliston could have stopped in time to avoid the collision. The defence did not instruct their own expert, something it is argued would have assisted their case. Amateur cyclists have questioned the accuracy of the calculations performed by the police officers regarding stopping distance,[62] and the "experiment" performed by the police officers suffered from many methodological flaws. Chief among them the fact that their reconstruction was carried out on a different surface, with Charlie Alliston's bike being ridden by an officer of a different height and build, who was not familiar with the bike (though had some experience of riding fixed-wheel bikes). The distances used to make the calculations were taken from CCTV, something known to be problematic due to the foreshortening effect.[63]

This article does not engage any more deeply with these questions, as they are not crucial to the argument being advanced. ***Crim. L.R. 623***

Why not use the wanton and furious driving as the unlawful act?

It is not immediately apparent, from the wording of s.35, why this offence was not used as the unlawful act. During legal argument, it emerged that the Crown had taken the view that this offence could not be the basis for an unlawful act manslaughter offence due to the case of *Cooke*.[64] In that case, the jury were directed that "'misconduct' had its normal meaning and the jury must decide what conduct on the part of a driver fell below the proper standard of driving so as to be called misconduct". In *Alliston* the Prosecution had taken an abstruse offence contrary to Regulations, when they had also charged a seemingly more substantial offence on which they could base liability for unlawful act manslaughter with less difficulty. Hoewever, the Crown had formed the view that they could not use the wanton and furious driving as the unlawful act to provide the foundation for the manslaughter charge, based on *Andrews*, in which it was held that dangerous driving was not an offence which could underpin unlawful act manslaughter. The basis for this was that dangerous driving was the performance of a lawful act in such a way that it became unlawful, as opposed to an act that is never lawful, however it is performed.

Further, the Crown reasoned, the s.35 offence was one of negligence. When considering the definition of "wilful misconduct", the court in *Cooke* had held that "misconduct" required an analysis of the defendant's behaviour as compared to a "proper standard of driving", and whether it fell below that standard. Similarly, extrapolating from the offence of misconduct in public office, in which the word "wilful" also features, and has been held to relate to "standards",[65] the Crown took the view that "standards" was synonymous with "negligence" as it related to an analysis of reasonableness. Therefore, with precedent that offences of lawful acts performed negligently are insufficient to found an unlawful act manslaughter charge,[66] the Crown relied on the offence contrary to the Regulations.

This may in part be a result of inconsistent interpretations of "wilfulness" in case law, albeit not in relation to the s35 offence. In *Sheppard* [67] Lord Diplock held that

"a man 'wilfully' fails to provide an adequate medical attention for a child if he either (a) deliberately does so, knowing that there is some risk that the child's health may suffer unless he receives such attention or (b) does so because he does not care whether the child may be in need of medical treatment or not." (p.403)

When considering offences of child neglect, specifically offences contrary to s.1 of the Children and Young Persons Act 1933, Baroness Butler-Sloss wrote in her report on child neglect[68] that:

"The term ‘wilful’ has presented numerous difficulties in the context of neglect, particularly for juries and lay magistrates who must ‘conceive how, ***Crim. L.R. 624*** as a matter of ordinary language, an omission can be wilful but not deliberate’,[69] and is regarded as a term that is ‘beset by lack of clarity’."[70]

In *W*,[71] a highly experienced Judge was criticised by the Court of Appeal (leading judgment given by Judge LJ, then PQBD) for omitting to direct the jury in line with *Sheppard*,[72] "though it did not render the conviction unsafe, as it had been clear that the appellant was denying all knowledge of those matters alleged, not that there had been a reckless, as opposed to deliberate, failure". Similarly in *JD*,[73] the appellant argued that "the judge failed (i) to direct the jury that any wilful assault had to be carried out in a manner which likely to cause unnecessary suffering or injury to her health and (ii) to give any or any sufficient direction to the jury on the issue of whether the acts relied on were "wilful" as that word was explained by the House of Lords in *Sheppard*".[74] In a reserved judgment, their Lordships went into some detail about the meaning of that word, considering whether its meaning differed depending on whether it concerned an action, or a failure to act:

"The *mens rea* is an important element of any offence which is not one of strict liability. The requirement that the *actus reus* should be ‘wilfully’ shows that this is not an offence of strict liability. In our view, the judge should have directed the jury as to the need for them to be sure that any assault or ill-treatment was done ‘wilfully’ and he should have explained the meaning of that word. We shall consider later whether this omission renders the conviction unsafe. Before we can decide this question, we need to elucidate precisely what ‘wilfully’ means."

In *Turbill & Broadway*,[75] the Court of Appeal held that when considering offences contrary to s.44 of the Mental Capacity Act 2005, the test for wilfulness was subjective rather than objective, applying *Sheppard* and the later case of *Patel*.[76] Both parties agreed that recklessness, or failing to do what a careful and competent carer would do, was not enough. The term "wilfully" meant deliberately refraining from acting, or refraining from acting because of not caring whether action was required or not.[77] Consequently, the judge had made an error of law when, in parts of the summing up, he appeared to equate carelessness or negligence with wilful neglect, as Parliament had decreed that neglect was not enough to constitute a criminal offence, even of a vulnerable patient. The neglect had to be "wilful" and that meant something more was required than a duty and what a reasonable person would regard as a reckless breach of that duty. The judge had used a variety of expressions: he used "reckless" without defining it and without directing the jury that it was not simply an objective test; he used "careless", "carelessness" and "grossly careless" as if they necessarily equated to a "couldn’t care less attitude", ***Crim. L.R. 625*** which they did not. Even "gross carelessness" would not, of itself, be sufficient to amount to wilful neglect.[78]

However, in the offence of perjury, it was held in *Millward*,[79] that "wilfully" merely meant that the statement was made deliberately, and not inadvertently or by mistake. The same interpretation is used in misconduct in public office, where Widgery CJ stated in *Dytham*,[80] "The neglect must be wilful and not merely inadvertent" suggesting that for this offence wilful will simply be the opposite of accidental. *Attorney General’s Reference (No.3 of 2003)*,[81] however, stated that the correct mental element for the offence was subjective recklessness—of the type seen in *Cunningham*,[82] and later, *G*[83]:

"The issue which was perceived to have caused the problem at trial, and the principal question perceived to have resulted from the judge’s ruling, has, in our view, been resolved by the decision in *G*. There must be an awareness of the duty to act or a subjective recklessness as to the existence of the duty. The recklessness test will apply to the question whether in particular circumstances a duty arises at all as well as to the conduct of the defendant if it does. The subjective test applies both to reckless indifference to the legality of the act or omission and in relation to the consequences of the act or omission."[84]

In that case, the Attorney General referred a point of law to the Court of Appeal after the trial Judge ruled that there was no case to answer at the close of the Prosecution case. ND, and other police officers, were charged with manslaughter and misconduct in a public office. On the manslaughter charges, the allegation was of conduct amounting to gross negligence. The "misconduct in a public office" charges alleged that each defendant "misconducted himself whilst serving as a police officer, by wilfully failing to take reasonable and proper care of [CA], an arrested person in police custody". The Judge ruled that recklessness was enough, to keep the criminal offence of misconduct in public office aligned with the requirements of the tort of misfeasance in public office.

The approach from *Dytham* that was more recently confirmed in *DL*.[85] Their Lordships considered *AG's Ref (No.3 of 2003)* in their judgement, but made no express discussion of it, other than to confirm it: "It is no part of the purpose of this judgment to seek to revisit the formulation of the offence as enunciated in *Attorney General's Reference (No.3 of 2003)*".[86] Similarly, they cited *Dytham*, without seeking to analyse its reconciliation with recklessness.[87]

Consequently, two interpretations of "wilful" have developed. Broadly, one strand is that applied to offences of neglect of vulnerable individuals, and the other ***Crim. L.R. 626*** is that applied to other offences in which "wilfulness" is an essential ingredient. Where "wilfulness" is required in the context of neglect of the vulnerable it seems to have a higher threshold than for other offences. If comparing the articulation of "wilfulness" in *Turbill* with that in *Cooke*, Cooke was criminalised at much lower culpability than Turbill. This appears counter-intuitive, as society might expect that the threshold would be lower when it concerns the care of those less able to protect their own welfare.

Should the standard be subjective or objective? *Turbill* is clear that it is subjective. In *Alliston* it was objective, as the position adopted by the Crown, and not challenged, was that the s.35 offence was one concerned, broadly, with negligent performance of deliberate acts. This was why the s.35 offence was not used as the "unlawful act" of the manslaughter—talk of "standards" in *Cooke* meant the Crown concluded that this was an offence with negligence as the mens rea. In none of the case law has the articulation of "wilful" as found in *Cooke* been examined; none of the s.35 cases that have reached appellate level have addressed that element of the offence. There seems to have been no consideration of the differing interpretations of the word "wilful" in different areas of case law. However, that was the articulation applied in *Alliston ,* and there was no legal argument surrounding the definition of "wilful misconduct" under s.35.

In her summing up, the judge directed the jury as follows[88]:

"The Act talks about wanton and furious driving, but it also talks about 'other wilful misconduct'. And it is on that basis that the Crown prosecutes this case. So what you are looking for in order to convict is that you are sure of these three steps. One, that you are sure D's wilful misconduct whilst in charge of the vehicle caused bodily harm to another road user. The misconduct you are looking for is really the same as before – that without a front brake D rode on a road where there was moving traffic, parked vehicles, changing traffic lights and pedestrians at a speed averaging 18 mph up to the junction and 10-14 mph within the junction. It is not in dispute that he deliberately rode in this way. You must be sure this amounts to misconduct. It is a matter for you. You know what conduct means. What we are looking for is misconduct. Wilful means no more than deliberate, i.e. that it was his choice to ride in this way. It is not in dispute that D chose to ride in the way he did."

Her Ladyship thus took the interpretation set out from case law above of "wilful" meaning behaving in a certain manner deliberately.

More broadly, however, I would argue that the possible lack of clarity in how this offence is to be interpreted reinforces calls for new, clear legislation relating to serious injury and deaths caused by cyclists. For mechanical vehicles, poor performance of lawful acts has been criminalised by statute, with specific offences of causing death by dangerous driving[89]; causing death by careless driving whilst under the influence of alcohol or drugs[90]; causing death by careless or inconsiderate driving,[91] and causing death by unlawful driving where D is unlicensed, disqualified ***Crim. L.R. 627*** or uninsured.[92] These, however, cannot be applied to cyclists, leaving a lacuna in the law where a cyclist has not been grossly negligent, but their act has nonetheless caused death.

Gross negligence manslaughter

In *Alliston*, the Crown had chosen not to proceed down the route of gross negligence manslaughter. I would argue that it would be harder to convince a jury that riding in compliance with the rules of the road on a bike that was well-maintained and ridden by a rider familiar with fixed-wheel bikes was grossly negligent simply because it did not have front brakes. It might well be negligent, but that is not sufficient. The level of negligence that is needed for a finding of gross negligence has been re-emphasised recently in the Court of Appeal's judgment in *Rose*.[93] In that case, the Court of Appeal, in a judgment delivered by the President of the QBD, restated the ingredients of the offence[94]:

"There are, therefore, five elements which the prosecution must prove in order for a person to be guilty of an offence of manslaughter by gross negligence:

(a) the defendant owed an existing duty of care to the victim;

(b) the defendant negligently breached that duty of care;

(c) it was reasonably foreseeable that the breach of that duty gave rise to a serious and obvious risk of death;

(d) the breach of that duty caused the death of the victim;

(e) the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.

(3) The question of whether there is a serious and obvious risk of death must exist at, and is to be assessed with respect to, knowledge at the time of the breach of duty.

(4) A recognisable risk of something serious is not the same as a recognisable risk of death."

That same judgment has also clarified the foreseeability element of that offence.[95] To be so far below the standard of the "reasonable cyclist of his age and experience" might have required Charlie Alliston to be riding over the speed limit, in a pedestrian area, on the pavement, or through red lights. Even in cases where such things have happened, we have seen that the police and CPS do not ordinarily authorise a manslaughter charge, suggesting that on the facts they do not think that gross negligent manslaughter or unlawful act manslaughter hold a realistic prospect of conviction. ***Crim. L.R. 628***

Fatal collisions involving cyclists—the need for new legislation

This general proposition is illustrated by three earlier cases in which cyclists have caused the death of a pedestrian and only been prosecuted for the s.35 offence. All, I argue, demonstrate far greater culpability for the deaths caused by their riding than Charlie Alliston. All came before the appellate court as appeals against sentence, and are referred to for their facts, as opposed to any legal principle that can be extracted. It is, however, arguable that these facts could have founded gross negligence manslaughter charges. It is assumed that none of them led to unlawful act manslaughter charges on the basis of *Cooke*.

a) **Lambert [2008] EWCA Crim 2109**

Aged 17 and a half, and of effective good character, D was approaching a bus stop on his nearside. As he approached the bus stop he was overtaken by a bus. Three people, including 82-year old V, stood up and moved to board the bus. Instead of stopping behind the bus or overtaking it on its offside in the road, the D mounted the pavement without slowing down. Even if he had applied his brakes, the rear brake was wholly ineffective and the front brake could only be applied at all with great effort. It is estimated that he was travelling at 12–13mph. He rode straight into V, knocking her into the air and onto the ground on which she struck her head. She died of her injuries later that day.

b) **Hall [2009] EWCA Crim 2236**

Aged 19 years old, D was approaching a T-junction controlled by traffic lights, intending to turn left. He claims that as he approached the traffic lights he was forced to mount the pavement to avoid a vehicle which had pulled in front of him. He remained cycling on the pavement, round the blind corner, where he collided with 84-year-old V, who was knocked to the ground into the road. V was conscious and oriented, but a brain scan revealed internal haemorrhaging. After a while his condition seemed to improve, but twelve days after the accident he died unexpectedly from a

pulmonary embolism. The pathologist judged the pulmonary embolism was a direct result of the head injury.

c)

Gittoes [2015] EWCA Crim 1608

20-year-old D, who had previous convictions for 21 unrelated offences, was cycling, at around 15.00, through an area clearly marked as pedestrianised between 10.30 and 16.30. CCTV showed him weaving between pedestrians. The bicycle was not roadworthy. It had no brakes, no bell, no lights and a cracked tyre. The appellant knew that bicycles were not permitted in that area, not least as he had been told previously by a police officer not to cycle there. D tried to weave between V and her friend and other pedestrians. He struck V causing her to fall to the floor, where she struck her head ***Crim. L.R. 629*** and suffered devastating head injuries. She died just over a week later.

All three appellants had pleaded guilty at the earliest opportunity to an offence contrary to s.35. All received immediate terms of detention of 12 months. What these incidents do show, however, as do a further two fatal collisions between cyclists and pedestrians reported in the national news in the weeks after Charlie Alliston's conviction,[96] is that there is a lacuna in the law that needs filling in a considered way.[97]

Unsurprisingly, this case has led to calls for new legislation, led by the deceased's widower.[98] His MP, Heidi Alexander, raised the issue with the Prime Minister at the first Prime Minister's Questions of the new sitting year. The Prime Minister's response hinted that the Transport Secretary should consider whether the laws on dangerous and careless driving, as set out above, should be extended to cyclists.[99] I would argue that the enactment of new laws, as opposed to an attempt to stretch existing laws, would be a more appropriate response, to ensure fair-labelling and properly precise and predictable criminalisation.

Conclusion

The case of *Alliston* has highlighted two problems: the continuing deeply unsatisfactory nature of unlawful act manslaughter, and the need for legislation to consider properly the position of cyclists. As numbers of cyclists increase, it must be highly likely that fatal collisions will also.

There are many intellectual reasons why it would have been welcome had this case been considered by the Court of Appeal—the issue of strict liability offences underpinning unlawful act manslaughter is unresolved, and the correct definition of "wilful" remains a point of speculation. Considering that hard cases make bad law, however, it is perhaps for the best that it did not. For a path to the Court of Appeal, either there would have had to have been a ruling in favour of the defence on the submission of no case to answer, or there would have had to have been a conviction on the unlawful act manslaughter count. A family had lost a mother and a wife, only in her forties, now deprived of the chance to watch her children grow up, and pursue her career. A young man, 18 at the time of the collision, of previous good character, was tried in the glare of vitriolic media coverage. Acquitted of manslaughter, he was convicted of the wanton and furious driving count,[100] and sentenced to a term of immediate imprisonment of 18 months. ***Crim. L.R. 630*** [101]

What remains, however, is a system where a minor regulatory infraction can, potentially, found a manslaughter charge. In the absence of any specific offences of causing death by the sub-standard riding of a bicycle (or the riding of a sub-standard bicycle), such as exist for motorised vehicles, prosecutions of cyclists involved in fatal collisions of this type will have to be prosecuted under constructive manslaughter offences if there is to be direct liability for the death. The options are gross negligence manslaughter or unlawful act manslaughter. It is argued that Charlie Alliston's riding was clearly not grossly negligent, and indeed the Crown implicitly accepted that by not advancing their case in that way.[102] The Crown's decision to take a far more difficult route to liability illustrated this, despite their refusal to acknowledge it. This left unlawful act manslaughter. With the Crown of the view (whether right or wrong) that wanton and furious driving could not act as a foundation to that offence, it was crucial that they found another. And because Charlie Alliston was riding a fixed-wheel track bike, they could. But in doing so, it is argued, they were seeking to broaden the types of offences which can underpin unlawful act manslaughter, to include those of strict liability. This extension exacerbates the already dubitable fairness of unlawful act manslaughter. This further compromises its adherence to correspondence principles. This gap between unlawful act

manslaughter and the correspondence principle cannot be closed by the requirement of the unlawful act being dangerous, when that dangerousness is assessed objectively.

The Crown's argument in favour of allowing them to proceed in this way, which all agreed was novel for a fatal collision between cyclist and pedestrian, was that however unsatisfactory the Law Commission and many academic commentators thought unlawful act manslaughter was, it represents the current state of the law. Much reliance was placed on *F(J) and E(N)*. When considering whether using an objective standard in assessing perception of dangerousness in unlawful act manslaughter cases was acceptable, Lord Thomas CJ stated:

"In any event, neither Parliament nor the Executive have sought to carry forward the recommendations in respect of unlawful act manslaughter. As is evident from the Law Commission Reports to which we have referred the issue as to the scope of the offence of manslaughter is one on which there has been significant debate. In commenting on the decision of this court in *R v JM [2013] 1 WLR 1083* where a different issue was involved, Professor Andrew Ashworth wrote at [2013] Crim LR 335:

'In the longer term, common law manslaughter ought to be revisited by the Law Commission, since its most recent review of homicide law was focused on other matters and consequently treated this form of manslaughter rather cursorily: Law Com. No.304, Murder, Manslaughter and Infanticide (2006), pp.61-64. It is unlikely that the conflict of ***Crim. L.R. 631*** principle referred to [earlier in the comment] will be resolved to the satisfaction of all, but it is more appropriate that there be wide consultation on detailed questions about the ambit of any such offence than that these issues be resolved piecemeal by the courts, without clear parameters to guide them.'

We agree. As we have explained, the law is clear and well established. It must be for Parliament to determine whether the long-established law needs changing in the light of the Law Commission's various recommendations or whether a further examination is needed by the Law Commission."[103]

In response, I offer the words of the late Lord Toulson in his leading judgment in *Patel v Mirza*:

"In *Tinsley v Milligan* Lord Goff considered that if the law was to move in a more flexible direction, to which he was not opposed in principle, there should be a full investigation by the Law Commission (which has happened) and that any reform should be through legislation. Realistically, the prospect of legislation can be ignored. The government declined to take forward the Commission's bill on trusts because it was not seen to be "a pressing priority for government" (a phrase familiar to the Commission), and there is no reason for optimism that it would take a different view if presented with a wider bill. In *Clayton v The Queen (2006) 231 ALR 500*, para 119, Kirby J said that waiting for a modern Parliament to grapple with issues of law reform is like "waiting for the Greek Kalends. It will not happen" and that "Eventually courts must accept this and shoulder their own responsibility for the state of the common law". The responsibility of the courts for dealing with defects in the common law was recently emphasised by this court in *R v Jogee [2016] 2 WLR 681*."[104]

If reform of unlawful act manslaughter is not to come with the Kalends than an appellate court will need to make a brave move. It took the Home Office four years to respond to the Law Commission's report, which had proposed replacing the offence of involuntary manslaughter by two new offences of reckless killing.[105] The first where the defendant knew that his conduct may cause death or serious injury, and the second, killing by gross carelessness, where the defendant's conduct carried an obvious risk of causing death or serious injury and fell far below what can reasonably be expected of the defendant in the circumstances. As Reed notes[106]: "The government accepted the case for and the specification of these welcome new offences. Two cheers for this affirmation; implementation will be longer in coming, if ever."

Reed was prescient, or perhaps, realistic. Despite the recommendations of the Law Commission, Parliament has still not acted, 15 years later. It cannot be assumed that that means that action is not desperately needed. As Lord Toulson notes, there are many areas in need of reform for which we have not waited for Parliament, including the mens rea for joint enterprise murder. Had a terminatory ruling been ***Crim. L.R. 632*** made at the close of the Prosecution case, or if Charlie Alliston had been convicted, this would have been the opportunity to do so. His acquittal on the more serious count does not excuse the state of the law in this area, and the Crown's willingness to seek to extend even further liability already so removed from culpability as to be an affront to justice.

Despite criticism (rightly, I argue) of unnecessary legislation in startling volumes,[107] this is surely an area that requires (succinct, well-drafted) legislation akin to that which is imposed on car drivers. Such

would provide certainty, and ensure that prosecutions for fatal offences have to focus on the quality of the riding, and the mental element in relation to that.

This case has served as a stark reminder of how far liability can reach. Despite the calls of the Law Commission, and repeated reservations succinctly articulated by the appellate courts, unlawful act manslaughter flourishes in new directions. This cannot be desirable if we are to value correspondence between culpability and punishment, and the fair-labelling principle.

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1. R.J. Buxton, "By Any Unlawful Act" (1966) 82 L.Q.R. 174.

2. E.g. G. Leigh, "Deconstructing Unlawful Act Manslaughter" (2017) 81(2) Journal of Criminal Law 112; A. Ashworth, *Meeking* [2013] Crim. L.R. 333 amongst others.

3. In its report Involuntary Manslaughter (1996), Law Com. No.237 the Law Commission argued for the abolition of this form of liability. Regrettably, it then took a substantially more ambivalent approach towards it in Law Com. No.304 (2006). Many commentators, however, remain opposed to such liability, arguing that it relies on "outcome luck", which is wholly outside the control of the defendant (cf. *Mallett [1972] Crim. L.R. 260*, with *Arobieke [1988] Crim. L.R. 314*).

4. Road Traffic Offenders Act 1988 Sch.2 para.1.

5. Road Traffic Act 1988 s.1.

6. *Wilkinson's Road Traffic Offences, 28th edn (London: Sweet & Maxwell, 2017)*.

7. *Telford [1954] Crim. L.R. 137*; *Wilkinson's Road Traffic Offences (2017), para.5-113*.

8. *Cooke [1971] Crim. L.R. 44*.

9. *Wilkinson's Road Traffic Offences (2017), para.5-114*.

10. *Okosi [1997] R.T.R. 450; [1996] Crim. L.R. 666*.

11. *Dalloway (1847) 2 Cox C.C. 273*.

12. *Franklin (1883) 15 Cox C.C. 163*.

13. *Scarlett [1993] 4 All E.R. 629; (1994) 98 Cr. App. R. 290; [1994] Crim. L.R. 288*.

14. *Lowe [1973] Q.B. 702; (1973) 57 Cr. App. R. 365*.

15. *Carey [2006] EWCA Crim 16; [2006] 2 Cr. App. R. (S.) 63* (p.416) (although the appellants in that case had their convictions quashed for lack of causation between the unlawful act and the death, and caution was urged when charging unlawful act manslaughter with affray as the unlawful act. Such a course would only succeed where there were ostensible characteristics of V that made them susceptible to serious physical harm from the shock or distress caused by an affray—at [36]).

16. *Bristow [2013] EWCA Crim 1540; [2014] Crim. L.R. 457*.

17. *Dawson (1985) 81 Cr. App. R. 150; [1985] Crim. L.R. 383*.

18. *Andrews v DPP [1937] A.C. 576; (1938) 26 Cr. App. R. 34*.

19. *Andrews [1937] A.C. 576* at 584–585.

20. *Andrews [1937] A.C. 576* at 585.

21. *A. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G.J. Virgo, Simester and Sullivan's Criminal Law: Theory and Doctrine, 6th edn (Oxford: Hart Publishing, 2016), p.411*.

22. *Simester, Spencer, Stark, Sullivan and Virgo, Simester and Sullivan's Criminal Law: Theory and Doctrine (2016), p.411*.

23. See Buxton, "By Any Unlawful Act" (1966) 82 L.Q.R. 174.

24. Buxton, "By Any Unlawful Act" (1966) 82 L.Q.R. 174, 181.

25. Buxton, "By Any Unlawful Act" (1966) 82 L.Q.R. 174, 185.

26. The decision in *Dalby [1982] 1 W.L.R. 425; (1982) 74 Cr. App. R. 348*, in which the Court of Appeal stated that the unlawful act must be aimed at the victim has not since been adhered to. In *Goodfellow [1986] 83 Cr. App. R. 23; [1986] Crim. L.R. 468* their Lordships explicitly stated that they doubted that *Dalby* was an accurate representation of the law, interpreting it as meaning that there must be no intervening act between the defendant and the deceased. They supported their conclusion by reference to the cases of *Pagett (1983) 76 Cr. App. R. 279; [1983] Crim. L.R. 393*; and *Mitchell [1983] Q.B. 741; (1983) 76 Cr. App. R. 293*, in neither of which was the unlawful act aimed at the deceased, but aimed at another who was physically close by to the deceased.

27. *A.P. Simester, "Is Strict Liability Always Wrong?" in A.P. Simester (ed.), Strict Liability (Oxford: Oxford University Press, 2005)*.

28. *Simester, "Is Strict Liability Always Wrong?" in Simester (ed.), Strict Liability (2005), p.22*.

29. *Simester, "Is Strict Liability Always Wrong?" in Simester (ed.), Strict Liability (2005), p.43*

30. A. Reed, "Unlawful Act Manslaughter and Consensual Activity" (2003) 67(6) J. Crim. L. 453.

31. *Lamb [1967] 2 Q.B. 981; (1967) 51 Cr. App. R. 417*.

32. *Lamb [1967] 2 Q.B. 981* at 988.

33. *Andrews (Christopher) [2002] EWCA Crim 3021; [2003] Crim. L.R. 477*.

34. D.C. Ormerod, Andrews [2003] Crim. L.R. 477.

35. Reed, "Unlawful Act Manslaughter and Consensual Activity" (2003) 67(6) J. Crim. L. 453, 459.

36. *Meeking [2012] EWCA Crim 641; [2012] 1 W.L.R. 3349; [2013] R.T.R. 4* (p.67).

37. As per Toulson LJ *Meeking [2012] EWCA Crim 641; [2012] 1 W.L.R. 3349; [2013] R.T.R. 4* (p.67) at [14].

38. Ashworth, *Meeking* [2013] Crim. L.R. 333.

39. *Meeking [2012] EWCA Crim 641; [2012] 1 W.L.R. 3349; [2013] R.T.R. 4* (p.67) at [45].

40. M. Dyson, "The smallest fault in manslaughter" (2017) 6 Arch. Rev. 4.

41. The exceptions to this are the specific "causing death by …" offences pertaining to specific road traffic offences, as discussed below.

42. Dyson, "The smallest fault in manslaughter" (2017) 6 Arch. Rev. 4, 5.

43. *F(J) [2015] EWCA Crim 351; [2015] 2 Cr. App. R. 5 (p.64)*.

44. *M [2012] EWCA Crim 2293; [2013] 1 W.L.R. 1083; [2013] 1 Cr. App. R. 10* (p.144), comment at [2013] Crim. L.R. 335.

45. Buxton, "By Any Unlawful Act" (1966) 82 L.Q.R. 174, 195.

46. *Newbury [1977] A.C. 500; (1976) 62 Cr. App. R. 291*.

47. *Andrews (Christopher) [2002] EWCA Crim 3021; [2003] Crim. L.R. 477*.

48. *F(J) [2015] EWCA Crim 351; [2015] 2 Cr. App. R. 5* (p.64).

49. *Church [1966] 1 Q.B. 59; (1965) 49 Cr. App. R. 206*.

50. *Newbury [1977] A.C. 500; (1976) 62 Cr. App. R. 291*.

51. Buxton, "By Any Unlawful Act" (1966) 82 L.Q.R. 174, 190–191.

52. Buxton, "By Any Unlawful Act" (1966) 82 L.Q.R. 174, 190–191.

53. *S [2015] EWCA Crim 558; [2015] 2 Cr. App. R. (S.) 29* (p.260).

54. *S [2015] EWCA Crim 558; [2015] 2 Cr. App. R. (S.) 29* (p.260) at [20].

55. See Leigh, "Deconstructing Unlawful Act Manslaughter" (2017) 81(2) Journal of Criminal Law 112, 123.

56. Applying *Ireland [1998] A.C. 147; [1998] 1 Cr. App. R. 177 HL*.

57. *Dawson (1985) 81 Cr. App. R. 150; [1985] Crim. L.R. 383*.

58. *Watson [1989] 2 All E.R. 865; (1989) 89 Cr. App. R. 211; [1989] Crim. L.R. 733*.

59. *M [2012] EWCA Crim 2293; [2013] 1 W.L.R. 1083; [2013] 1 Cr. App. R. 10* (p.144).

60. However, the unlawful act manslaughter count was dropped, apparently as a result of a failure to agree between the medical experts as to the causation aspect, http://www.thenorthernecho.co.uk/news/local/northdurham/consett/10829894.Brothers_jailed_for_nightclub_fight_which_took_place_before_ [Accessed 22 May 2018].

61. *M [2012] EWCA Crim 2293; [2013] 1 W.L.R. 1083; [2013] 1 Cr. App. R. 10* (p.144), at [21].

62. See http://thecyclingsilk.blogspot.co.uk/2017/08/a-note-on-law-manslaughter-dangerous.html [Accessed 22 May 2018].

63. A. Willis, R. Kukla, J. Kerridge, "Developing the Behavioural Rules for an Agent-based Model of Pedestrian Movement", Paper presented at 25th European Transport Congress, Cambridge, UK, September 2000, http://www.iidi.napier.ac.uk/c/publications/publicationid/296268 [Accessed 22 May 2018].

64. *Cooke [1971] Crim. L.R. 44*.

65. *Cooke [1971] Crim. L.R. 44*.

66. *Andrews [1937] A.C. 576; (1938) 26 Cr. App. R. 34*.

67. *Sheppard [1981] A.C. 394; (1981) 72 Cr. App. R. 82*.

68. *E. Butler-Sloss, The criminal law and child neglect: an independent analysis and proposal for reform (2013)*.

69. R. Taylor and L. Hoyano, "Criminal Child Maltreatment: the Case for Reform" [2012] Crim. L.R. 871.

70. D. Ormerod, "Cruelty to a person under 16: causing or procuring a child to be wilfully assaulted or ill-treated" [2009] Crim. L.R. 280; *Butler-Sloss, The criminal law and child neglect: an independent analysis and proposal for reform (2013), p.8*.

71. *W [2006] EWCA Crim 2723*.

72. *Sheppard [1981] A.C. 394; (1981) 72 Cr. App. R. 82*.

73. *D [2008] EWCA Crim 2360; [2009] Crim. L.R. 280*

74. *D [2008] EWCA Crim 2360* at [9].

75. *Turbill [2013] EWCA Crim 1422; [2014] 1 Cr. App. R. 7* (p.62).

76. *Patel [2013] EWCA Crim 965; [2013] Med. L.R. 507*.

77. *Turbill [2013] EWCA Crim 1422; [2014] 1 Cr. App. R. 7* (p.62) at [12].

78. *Turbill [2013] EWCA Crim 1422; [2014] 1 Cr. App. R. 7 (p.62)* at [19]–[21].

79. *Millward [1985] Q.B. 519; (1985) 80 Cr. App. R. 280*.

80. *Dytham [1979] Q.B. 722* at 727G.

81. *Attorney General's Reference (No.3 of 2003) [2004] EWCA Crim 868; [2005] Q.B. 73; [2004] 2 Cr. App. R. 23*.

82. *Cunningham [1952] 2 Q.B. 396*.

83. *G [2003] UKHL 50; [2004] 1 A.C. 1034; [2004] 1 Cr. App. R. 21* (p.237).

84. *Attorney General's Reference (No.3 of 2003) [2004] EWCA Crim 868; [2005] Q.B. 73; [2004] 2 Cr. App. R. 23*.

85. *D [2011] EWCA Crim 1259; [2011] 2 Cr. App. R. 14* (p.159).

86. *D [2011] EWCA Crim 1259; [2011] 2 Cr. App. R. 14* (p.159) at [21].

87. *Attorney General's Reference (No.3 of 2003) [2004] EWCA Crim 868; [2005] Q.B. 73; [2004] 2 Cr. App. R. 23* at [15]–[16]

88. I am grateful to Miriam Smith, Prosecution noting junior, for her note of the summing up.

89. Road Traffic Act 1988 s.1.

90. Road Traffic Act 1988 s.3A.

91. Road Traffic Act 1988 s.2B.

92. Road Traffic Act 1988 s.3ZB.

93. *Rose [2017] EWCA Crim 1168; [2018] Q.B. 328; [2017] 2 Cr. App. R. 28* (p.410).

94. *Rose [2017] EWCA Crim 1168; [2018] Q.B. 328; [2017] 2 Cr. App. R. 28* (p.410) at [77]

95. *Rose [2017] EWCA Crim 1168; [2018] Q.B. 328; [2017] 2 Cr. App. R. 28* (p.410) at [94]; "… we conclude that, in assessing reasonable foreseeability of serious and obvious risk of death in cases of gross negligence manslaughter, it is not appropriate to take into account what the defendant would have known but for his or her breach of duty."

96. See http://www.bbc.co.uk/news/uk-england-london-41212147 (RideLondon) [Accessed 22 May 2018] and https://www.theguardian.com/uk-news/2017/sep/14/woman-73-dies-after-collision-with-cyclist-in-central-london (Oxford Street) [Accessed 22 May 2018].

97. Until more details emerge of these cases, we cannot know the level (if any) of wrongdoing by the cyclists involved.

98. See https://www.theguardian.com/uk-news/2017/sep/09/kim-briggs-widower-this-is-not-about-anti-cycling-its-about-wrongdoing?utm_source=dlvr [Accessed 22 May 2018].

99. See https://www.theguardian.com/world/2017/sep/06/uk-government-review-extending-dangerous-driving-offence-cyclists [Accessed 22 May 2018].

100. Which suggests a measure of jury equity; the only way these verdicts are consistent is if the jury were sure that his having no front brakes was causative of serious injury to her, but was not causative of her death.

101. The Judge's full sentencing comments are publicly available: https://www.judiciary.gov.uk/judgments/sentencing-remarks-r-v-charlie-alliston/ [Accessed 22 May 2018].

102. In *Sellu [2016] EWCA Crim 1716; [2017] 4 W.L.R. 64; [2017] 1 Cr. App. R. 24* (p.349), endorsed by the Court in *Rose*, the Court had quashed a conviction for gross negligence manslaughter where "the judge failed to direct the jury sufficiently as to the line that separates serious or very serious mistakes or lapses from conduct which was '… truly exceptionally bad and was such a departure from that standard [of a reasonably competent doctor] that it consequently amounted to being criminal' (at [152])." I would argue that riding through a junction when the traffic lights are green in the rider's favour, at around 18mph on a 30mph road, even on a bike with an insufficient braking system, would not necessarily amount to gross negligence. Had it clearly done so, it seems likely it would follow that the Crown would have pursued a manslaughter conviction on that basis.

103. *F(J) [2015] EWCA Crim 351; [2015] 2 Cr. App. R. 5 (p.64)* at [32]–[33].

104. *Patel v Mirza* [2016] UKSC 42 at [114].

105. *Home Office, Reforming the Law on Involuntary Manslaughter: The Government's Proposals (2000)*.

106. Reed, "Unlawful Act Manslaughter and Consensual Activity" (2003) 67(6) J. Crim. L. 453, 464.

107. Sir Igor Judge, speech to the Lord Mayor of London's Dinner for Her Majesty's Judges, Mansion House, 15 July 2010, reported by Joshua Rozenberg, https://www.theguardian.com/law/2010/jul/15/law-kenneth-clarke-henry-viii [Accessed 22 May 2018].